ONG CHENG WAH & ANOR

v.

SUPRAMANIAM ARJUNAN

HIGH COURT MALAYA, TAIPING
VT SINGHAM JC
[CIVIL APPEAL NO: 12-33-2000]
15 MAY 2001

ROAD TRAFFIC: *Negligence - Collision between two vehicles - Plaintiff's inconsistent versions against defendant's consistent versions - Plaintiff presumed negligent when he collided from the rear - Whether finding of equal liability proper in the circumstances - Highway Code LN 165/1959, r. 22*

EVIDENCE: *Presumption - Negligence - Collision between two vehicles - Plaintiff collided from the rear - Whether plaintiff presumed negligent - Highway Code LN 165/1959, r. 22 - Whether sessions judge erred when he invoked s. 114(g) Evidence Act 1950 against defendant*

CIVIL PROCEDURE: *Appeal - Apportionment of equal liability - Whether proper - Collision between two vehicles - Plaintiff's inconsistent versions against defendant's consistent versions - Presumption that plaintiff was negligent when he collided from the rear - Highway Code LN 165/1959, r. 22 - Whether sessions judge properly evaluated the evidence - Whether sessions judge erred when he invoked s. 114(g) Evidence Act 1950 against defendant*

ROAD TRAFFIC: *Highway Code - Breach of Highway Code - Collision between two vehicles - Plaintiff collided from the rear - Whether plaintiff in breach of r. 22 Highway Code LN 165/1959*

This was an appeal by the defendants against the decision of the sessions judge who found both the plaintiff and the defendants equally liable in a road accident. The plaintiff was driving a motor lorry when he collided into the rear of the motor trailer driven by the 1st defendant ('the defendant'). The plaintiff's version of the accident in his police report contradicted with his version that he gave in court whilst the defendant's version was consistent and which in fact supported the plaintiff's version in the police report. The sessions judge accepted the plaintiff's evidence as more probable relying on the case of *Chean Siong Guat v. Public Prosecutor.*

Held:

[1] In *Chean Siong Guat v. Public Prosecutor* there were discrepancies between two different witnesses for the prosecution which the trial court found to be trivial and minor that did not affect the case therein. In the instant case, the sessions judge justified his decision based on the fact that the plaintiff's evidence in court was not impeached contrary to the weight of evidence and probabilities that were not supported by evidence.

[2] A mere failure to impeach the credit of the plaintiff does not change or erase the contradictions before the court and neither is the credibility of the plaintiff (based on two different versions of how the accident occurred) not questionable. The sessions judge should have made a specific finding on the contradictions between the plaintiff's evidence in court and that of the plaintiff's police report notwithstanding that there was no application to impeach the credit of the plaintiff.

[3] The dissenting view in *Wong Thin Yit v. Mohamed Ali* held that an appellate court is in as good a position as the trial judge to draw its own conclusions from the primary undisputed facts. It should not be assumed that the trial judge must necessarily be right just because he had seen and heard the witnesses. Even where the trial judge had been impressed by the demeanour of certain witnesses, the appellate court still has an obligation to scrutinise the evidence. The sessions judge had fundamentally misdirected himself and that warranted appellate intervention despite the trite view that findings of fact by the trial court should not generally be disturbed.

[4] A mere finding that both parties are equally responsible for the accident without proper judicial appreciation or evaluation of the totality of evidence is not a judgment according to law. The sessions judge must give reasons based on the facts and the law as to how he arrived at his decision.

[5] The sessions judge had erred in law when he had on his own volition, without giving any opportunity to both parties, invoked s. 114(g) of the Evidence Act 1950 against the defendant for not calling the attendant of his motor trailer to support his evidence in court. Even on the facts, adverse inference could not be invoked against the defendant just because the defendant was not challenged and asked whether he was calling the attendant as his witness. Further, the plaintiff neither raised it during cross-examination nor raised it in his submissions.

[6] Rule 22 of the Highway Code LN 165/1959 would apply against the plaintiff as the collision was from the rear. Therefore, there was *prima facie* evidence of negligence against the plaintiff. The onus was on the plaintiff to prove affirmatively that the accident occurred due to the negligence of the defendant and it was not for the defendant to excuse himself that he was not negligent.

[7] The plaintiff's evidence was a complete deviation as to how the accident occurred when compared to his police report. His evidence was therefore highly suspect and required satisfactory explanation before the court could rule in his favour. There was no doubt that his evidence in court was an afterthought attempt to exculpate himself from being responsible for the accident. Had the sessions judge took into account that the entirely new version of the plaintiff's evidence in court came six years after he had made his police report (which was lodged the next day after the accident), the sessions judge would have no doubt found for the defendant on the balance of probabilities.

[Defendant's appeal allowed; sessions judge's apportionment of liability on 50:50 basis set aside; plaintiff's claim dismissed with costs.]

Case(s) referred to:

Abdul Mokhti Hj Ahmad v. Idris Ibrahim [1977] 2 MLJ 85 ***(foll)***
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors [1995] 3 CLJ 639 ***(foll)***
Benmax v. Austin Motor Co Ltd [1955] 1 All ER 326 ***(foll)***
Browne v. Dunn [1893] 6 R 67 ***(con)***
Chan Peng Fook v. Kan Pak Lee [1974] 2 MLJ 197 ***(foll)***
Chean Siong Guat v. PP [1969] 2 MLJ 63 ***(dist)***
Chew Soo Lan v. Ludhiana Transport Syndicate & Anor [1976] 2 MLJ 205 ***(con)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd (Formerly Known As Maltran Air Services Corp Sdn Bhd) & Another Appeal [1996] 3 CLJ 163 ***(foll)***
Chong Keow v. Shaari Yaacob [1988] 1 CLJ 325; [1988] 1 CLJ (Rep) 463 ***(foll)***
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 2 MLJ 165 ***(foll)***
Coghlan v. Cumberland [1898] 1 Ch D 704 ***(foll)***
Hadmor Productions Ltd v. Hamilton [1983] 1 AC 191 ***(foll)***
Hitam Abdullah & Anor v. Kok Foong Yee (F) & Anor [1974] 1 MLJ 193 ***(con)***
Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 ***(foll)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(foll)***
Kerry v. Carter [1969] 1 WLR 1372 ***(foll)***
Lim Choon Ghee v. Sharizan Md Isa [1998] 2 CLJ 904 ***(con)***
Lim Kim Chet & Anor v. Multar Masngud [1984] 2 MLJ 165 ***(foll)***
Lofthouse v. Leicester Corporation (The Times Law Reports) [1948] vol lxiv ***(con)***
Mohd Samsuddin Ismail v. Tan Yeow Hwa & Anor [2000] 4 CLJ 398 ***(foll)***
Munusamy v. PP [1987] 1 MLJ 492 ***(dist)***
Muthusamy v. PP [1948] 14 MLJ 57 ***(con)***

Ng Chui Sia v. Maimon Ali [1983] 1 MLJ 110 ***(foll)***
R v. Low Toh Cheng [1941] 10 MLJ (SSR) 1 ***(con)***
Rasidin Partojo v. Frederick Kiai [1976] 2 MLJ 214 ***(con)***
Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh [1997] 3 CLJ 225 ***(foll)***
Rosita Baharom & Anor v. Sabedin Salleh [1992] 1 CLJ 180 ***(foll)***
Samar Mansor v. Mustafa Kamarul Ariffin [1974] 2 MLJ 71 ***(foll)***
Siti Aisha Ibrahim v. Goh Cheng Hwai [1982] CLJ 544; [1982] CLJ (Rep) 326 ***(con)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 ***(foll)***
Taharuddin Ahmad v. Leo Moi & Anor [1989] 2 CLJ 1271; [1989] 2 CLJ (Rep) 543 ***(con)***
Tan Kim Leng & Anor v. Chong Boon Eng & Anor [1974] 2 MLJ 151 ***(con)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 30 MLJ 87 ***(con)***
Wan Norsiah Wan Abdullah v. Che Harun Che Daud [1980] 1 MLJ 237 ***(con)***
Wong Thin Yit v. Mohamed Ali [1971] 2 MLJ 175 ***(con)***
Yahaya Mat & Anor v. Abdul Rahman Abu [1982] CLJ 68; [1982] CLJ (Rep) 363 ***(con)***
Yahaya Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 ***(con)***

Legislation referred to:
Evidence Act 1950, s. 114g
Highway Code LN 165/1959, r. 22
Road Transport Act 1987, s. 63(1)

For the respondent/plaintiff - V Rajadevan; M/s Rajadevan & Assoc
For the appellants/defendants - S Imavathy; M/s Othman Hashim & Co

Reported by Usha Thiagarajah

JUDGMENT

VT Singham JC:
This is an appeal by the appellants/defendants against the decision of the Sessions Court judge, Taiping wherein the respondent/plaintiff's claim against the appellants/defendants was allowed with costs on 14 September 2000 and liability was apportioned as 50:50. The appellants/defendants being dissatisfied with the decision had filed an appeal to the High Court by a notice of appeal dated 18 September 2000 against the decision on liability.

Claim
The respondent's claim against the appellants was for damages arising out of a road accident which occurred on 22 December 1994 at/about 4.30am at KM 202.2 Lebuhraya Ipoh-Butterworth in the district of Kerian. The respondent was driving m/lorry No: WBM 5061 and the 1st appellant was driving m/trailer No: KD 552.

In this appeal, the 1st appellant and the respondent will be referred to as the defendant and the plaintiff respectively. In order to arrive at a just decision it is important to set out and consider the following relevant evidence which was adduced at the trial on behalf of both the parties.

Plaintiff's Version Of The Accident (SP3) (Evidence-In-Chief Of Plaintiff)

The plaintiff's evidence was that he was driving his m/lorry No: WBM 5061 and when he arrived at the place of accident he was following a m/lorry. At the time suddenly the defendant's m/trailler No: KD 552 came out (keluar) from the left to the right without giving any signal. In his police report which was lodged the next day, he has stated that "Pada 22 Disember 1994 jam lebih kurang 3.30 pagi apabila perjalanan saya sampai di kawasan Semanggol Kerian, tidak tahu, saya memotong sebuah m/lori (T) No. tidak ingat, tiba-tiba saya terasa tayar hadapan di sebelah kiri bergoncang dengan kuat, saya tidak dapat mengawal m/lori tanker lalu terbabas ke kiri jalan dan menjunam ke dalam parit." He said that when he stated in his evidence that the defendant's m/trailler came out "keluar adalah bermakna lori yang sedang berhenti di sebelah kiri jalanraya masuk ke kanan iaitu jalan sah saya". He further stated in his evidence that as the m/lorry entered into his path, he collided into the defendant's m/trailler at the rear right side of the m/trailler. "Selepas langgar, lori saya telah bergoncang, iaitu di bahagian kiri tayar hadapan. Lepas bergoncang lori saya pergi ke sebelah kiri. Selepas perlanggaran mula-mula lori saya hendak berlanggar dengan divider tetapi saya berjaya tidak langgar dengan divider tersebut. Lepas itu saya belok ke sebelah kiri. Selepas itu lori saya terjunam ke dalam parit iaitu di sebelah kiri. Divider di bahagian di tengah-tengah jalan saya. Sebelum kemalangan, m/lori itu tidak beri apa-apa isyarat lampu sebelum masuk ke sebelah kanan jalan sah saya."

It is to be observed at this stage that based on the evidence of the plaintiff in court, it would appear that there were two m/lorries on the road at the material time, one was the m/lorry that the plaintiff was following and the other vehicle was the defendant's m/trailler which he alleged came out from the left to the right and into his path.

Plaintiff's Police Report

The contents of the plaintiff's police report which was lodged the next day and marked as exh. P4, *inter alia*, states as follows:

> Pada 21/12/94 jam lebih kurang 9.45 mlm, saya bertolak dari Kuala Lumpur mahu pergi ke Butterworth dengan memandu m/lori Tangki No: WBM 5061 seorang diri.

Pada 22/12/94 jam lebih kurang 3.30 pagi apabila perjalanan saya sampai dikawasan Semanggol Km tidak tahu, saya memotong sebuah m/lori (T) No. tidak ingat, tiba-tiba saya terasa tayar hadapan di sebelah kiri bergoncang dengan kuat, saya tidak dapat mengawal m/lori Tanker lalu terbabas ke kiri jalan dan menjunam ke dalam parit.

Pada 22/12/94 jam lebih kurang 5.30 pagi saya telah sedar dari pengsan dan dapati saya berada di Hospital Parit, saya dimasukkan ke Hospital Parit Buntar selama satu hari.

Saya mendapat kecederaan kaki sebelah kiri lebam, telinga sebelah kiri koyak dan dijahit 15 jahitan, kepala dan belakang badan luka-luka terkena serpehan kaca.

Pada hari ini 24/12/94 saya datang ke Cawangan Trafik buat repot. Sekian repot saya.

Plaintiff's Evidence Under Cross-Examination

Under cross-examination, the plaintiff denied that his evidence in court was not the correct version as to how the accident occurred. His police report exh. P4 was shown to him and he said that it was made "sehari selepas kemalangan. Tidak boleh ingat di masa itu. Sebenar selepas saya buat lapuran polis, dua minggu lepas itu saya pergi ke Balai Polis buat tambahan repot dahulu tetapi pihak polis tidak membenarkan saya tambahan tersebut. Pada masa saya pergi buat lapuran polis, saya tidak boleh ingat sebab dalam kesakitan dan baru makan ubat, sebab itu tidak boleh ingat begitu terperinci. Pihak hospital ada memberitahu saya berapa jahitan sebab boleh ingat bila buat repot polis." He denied that his memory was good at the time he lodged the police report. "Sebelum kemalangan di lebuhraya, tidak ada kenderaan lain. Saya pasti, hanya sebuah lori sahaja." At this stage when his police report exh. P4 was referred to him again, he said that "saya tidak beri seperti lapuran ini iaitu saya memotong sebuah lori nombor tidak ingat pada pihak polis. P4 tidak tepat." He denied that he collided into the rear of the defendant's m/trailler which was proceeding on (sedang bergerak). He denied that the defendant's m/trailler did not stop at the side of the road and came into his path as alleged by him. He stated "bahagian m/lori saya sebelah kiri depan langgar m/lori itu iaitu di tepi m/lori saya. Sedikit bukan keseluruhan tepi. Bahagian m/lori defendan iaitu bahagian kanan belakang m/lori defendan. M/lori defendan pada masa itu, dari sebelah kiri perlahan-lahan, masuk ke laluan kanan. Saya mula nampak lori defendan jarak lebih kurang 50 kaki." He denied that his evidence in court was an afterthought version of the accident. He testified that "saya kata mulanya saya ekori m/lori sebab saya tidak pasti dalam Bahasa Melayu bila translate ke Bahasa Tamil baru saya faham. Sebab saya tidak tahu bagaimana nak cakap, saya terlepas cakap."

Before proceeding on further, it is important to observe that it is expressly stated in the record of appeal that the plaintiff took his oath and testified in Tamil at the Sessions Court (bercakap dan bersumpah dalam Bahasa Tamil) and the question of the plaintiff not being able to understand Bahasa Malaysia does not arise. There was no medical evidence to support the plaintiff's version that he was not in a healthy frame of mind when he lodged the police report. There was also no reason advanced on behalf of the plaintiff as to why he should go to the police station so soon the next day after the date of the accident if he was not in a healthy state of mind. There was also no evidence to support the plaintiff's allegation that the police did not allow him to lodge a second report when he went to the police station about two weeks later as alleged by him. It cannot be denied that the plaintiff's evidence in court on 31 March 2000 ie, about five years three months later was entirely and wholly a new version of how the accident occurred. If the plaintiff wished to relate in court how the accident occurred which is completely in contradiction of his version as contained in his police report which was lodged the next day after the accident, why did the plaintiff tender his police report and mark it as the plaintiff's exh. P4. It is to be observed at this stage that it was the plaintiff himself who wished to introduce two sets of version as to how the accident occurred, one being his version of the accident as related by him in court in his evidence-in-chief itself, compared to his other version being his police report exh. P4 which was lodged the next day after the accident and tendered in court as the plaintiff's exh. P4.

It is the view of this court that the purpose of tendering one's own police report, in this case, the plaintiff's own police report, exh. P4 is generally to support, corroborate or show consistency of the plaintiff's evidence in court. However, in this case, it would appear as stated above that the plaintiff himself had introduced two different and contradictory versions presented to the court on his behalf as to how the accident occurred and despite these two different versions, the plaintiff still expects the court to entertain his claim and enter judgment in his favour. As to the effect of material contradictions between the evidence of a witness in court and his police report (see *Wan Norsiah binti Wan Abdullah v. Che Harun bin Che Daud* [1980] 1 MLJ 237 and *Chew Soo Lan v. Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 205).

It is also important to take note of the plaintiff's statement of claim and the statement of agreed facts which was recorded in the notes of evidence and which formed the plaintiff's pleadings and his case as contained in the record of appeal.

Statement Of Claim

By para. 3 of the statement of claim, the plaintiff has pleaded as follows:

> Pada 22/12/94 jam lebih kurang 4.30 pagi semasa plaintif sedang memandu m/lorinya di KM202.2 Lebuhraya Utara-Selatan menuju ke arah Butterworth, dia telah berlanggar dengan m/lori defendan yang sedang menuju ke arah yang sama.

By this paragraph in his statement of claim, the plaintiff has expressly stated that the defendant's m/trailler was travelling in the same direction as the plaintiff's m/lorry and whereas his evidence in court which was elicited during cross-examination he has stated that the defendant's m/trailler which had stopped at the left side of the road came out onto the right side of the road and into his path which is against his own pleadings. In order to support the plaintiff's pleadings, there is also a statement of agreed facts as agreed by both parties and recorded by the Sessions Court judge and which reads as follows:

> Atas Isu Liabiliti. Fakta-fakta yang dipersetujui adalah seperti berikut:
>
> 1. Plaintif memandu lori No: WBM 5061.
> 2. Defendan memandu lori No: KD 552.
> 3. Kemalangan berlaku pada 22/12/94 jam lebih kurang 4.30 pagi.
> 4. Tempat kemalangan ialah KM202.2 Lebuhraya Ipoh/Butterworth.
> 5. Kedua-dua kenderaan dalam perjalanan yang sama menuju ke Butterworth.
> 6. Kedua-dua pihak bersetuju plaintif melanggar bahagian belakang lori defendan bahagian kanan.

At The Appeal

During the submissions before this court by learned counsel for the plaintiff, this court pointed out para. 3 of the statement of claim and item 5 of the statement of agreed facts to the counsel which seemed to show that the defendant's m/trailler was at all material times proceeding straight along the road in the same direction as the plaintiff's m/tanker and not according to the version as stated by the plaintiff in court ie, the defendant's m/trailler which was waiting/berhenti on the left side of the road suddenly came out to the right and into the plaintiff's path. The plaintiff's counsel conceded that both para. 3 of the statement of claim and item 5 of the statement of agreed facts would appear to show that both vehicles were in fact proceeding along the road in the same direction towards Butterworth and not as stated by the plaintiff in court ie, that the defendant's m/trailler which was waiting at the

left side of the road had come out to the right and into his path. However, the learned counsel for the plaintiff argued that both the statement of claim and the statement of agreed facts were not intended to show that the defendant's m/trailler which was waiting at the left side of the road did not come out to the right and into the path of the plaintiff as if that was the case, the plaintiff's claim would fail and there was no case for the plaintiff. The learned counsel for the plaintiff submitted and asked this court to consider para. 4(g), (h) and (i) under particulars of negligence of the statement of claim against the defendant which states as follows:

> (g) memasuki, menceroboh dan menghalang jalan laluan sah plaintif.
>
> (h) dengan tiba-tiba dan tanpa sebarang isyarat cuba menukar laluan perjalanannya.
>
> (i) dengan tiba-tiba dan tanpa sebarang isyarat cuba masuki lorong di kanan lebuhraya.

He argued that with these three particulars of negligence it was clear that the plaintiff did not intend to admit that the defendant's m/trailler was proceeding in the same direction as that of the plaintiff towards Butterworth. It was pointed out to him that para. 4(a) of the particulars of negligence of the statement of claim states the defendant was driving his m/lorry fast ie, memandu dengan laju dalam keadaan semasa itu whereas in his evidence the plaintiff has stated that the defendant's m/lorry "dari sebelah kiri perlahan-lahan, masuk ke laluan kanan." The learned counsel said it is normally included like that in the statement of claim. In *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196, His Lordship Sharma J (as His Lordship then was) said:

> It should be realised that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other.

In the circumstances, it is the view of this court that the plaintiff cannot be allowed to depart from his own pleadings with a view to introduce another set of version of how the accident occurred which is against his own pleadings and neither was an application made to the court to amend his pleadings.

In *Rosita bt Baharom, (An Infant Suing By Her Father And Next Friend Baharom bin Ismail) & Anor v. Sabedin bin Salleh* [1992] 1 CLJ 180, His Lordship Datuk Edgar Joseph Jr. J (as His Lordship then was) *inter alia* said:

> As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings ... *For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.* The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation ... Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised, by or against a party is equivalent to not hearing him at all and may thus be denial of justice. (See *Esso Petroleum Co. Ltd v. Southport Corporation* [1956] AC 218, per Lord Radcliffe, at p. 241.) The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. (See *Esso Petroleum Co. Ltd v. Southport Corporation* [1954] 2 QB 182, per Marris, LJ at 207.) In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any other business' in the sense that points other than those specified in the pleadings may be raised without notice.

And, explaining why pleadings uphold the right to a fair trial, Sir Jack Jacob and Iain Goldrein in their book *Pleadings, Principles and Practice* at p. 12 have this to say:

> The system of pleadings is thus primarily designed to bring the parties to an issue or issues on which alone the court can adjudicate between them, but it is also designed to fulfil some of the fundamental principles of natural justice, such as: that each party should have fair and due notice of what case he has to meet; that each party should have a reasonable opportunity of answering the claim or defence of his opponent; and that each party should have a reasonable opportunity of preparing his case on the basis of the issues disclosed in the pleadings. On this basis the fundamental right of each party to a fair trial is well founded. (emphasis is by this court)

In the circumstances, this court is of the view that the plaintiff cannot depart from his original version as contained in his pleadings unless there was an amendment which in this case, there was none.

Evidence Of Investigating Officer (SP1) (Evidence-In-Chief)

The plaintiff's first witness was the investigating officer, SP1. His evidence *inter alia* was as follows:

Kerosakkan m/lori plaintif No: WBM 5061

(a) bahagian depan kepada m/lori remuk

(b) shaft pemasangan tayar sebelah kiri dan kanan depan patah

Kerosakan m/lori defendan No: KD552

(a) dinding kanan belakang pecah

(b) tayar belakang kanan shaft sebelah kanan patah

(c) spring belakang kanan patah

(d) chasis belakang kanan patah

(e) lampu belakang kanan pecah

The investigating officer tendered the sketch plan with key drawn by him and was marked as exh. P1-P1K and the photographs were marked as P2AF. He was shown photograph P2F and he said that in exh. P1, "saya tidak lukis longgok serpihan kaca dan pecahan-pecahan pada lori yang boleh dilihat di eks. P2F (tambah) oleh sebab kaca dan pecahan telah disapu oleh pihak PLUS sebelum saya tiba. Benar bila saya tiba, tidak ada serpihan kaca seperti biasa."

Cross-Examination

Tempat kemalangan gelap.

In order to conclude his case, the plaintiff called three witnesses including his employer to prove his loss of earnings which is not relevant for the purpose of this appeal as the appeal is only against liability. The plaintiff then closed his case.

Evidence Of Defendant (Evidence-In-Chief)

He was driving his m/trailler from Kuala Lumpur and proceeding towards Kedah along the Lebuhraya. The accident occurred between 4-4.30am. As he was driving his m/trailler which was loaded with electrical goods along the left side of the road, the plaintiff's m/lorry collided into the rear of his m/trailler. The plaintiff's m/lorry skidded and then fell in front of his m/trailler. He did not stop his m/trailler after the accident as he was afraid that he might be robbed as there were electrical goods in his m/trailler. On his way as he was proceeding towards Kedah and before the accident he was all the time

on the left side of the road and did not at any time enter into the right side of the road. He tendered his police report which was lodged on the same day at about 11.45am and which was marked as exh. D1 to support his evidence.

Cross-Examination

He confirmed that he lodged the police report on the same day as the accident. He denied that he entered onto the main road from the side table and that he stopped his m/trailler after the accident.

It would appear from the record of appeal that there were only six questions which were put to the defendant in the cross-examination. The plaintiff's version of the accident was never put to the defendant. In *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors* [1995] 3 CLJ 639, His Lordship Gopal Sri Ram JCA in applying the rule in *Browne v. Dunn* [1893] 6 R 67 said:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

The defendant's evidence as to how the accident occurred was never challenged by the plaintiff. The defendant was not even challenged that his evidence in court was not the true version of the accident. The defendant's version is supported by his police report and which in fact supports the plaintiff's version of the accident as contained in the plaintiff's police report. The contents of the defendant's police report is as follows:

> Pada jam L/Kurang 8.30 malam 21.12.94 Saya dari Bangi K. mahu hantar barang-barang ke Butterworth dengan memandu m/lori KD 552 T/K 338 bersama kelendan dan membawa muatan barang letrik seperti disiri No 939492 (1) NR-A13CM / NRA13CM-SN REFRIGERATOR 10 ST (2) NR-A13CM/ NRA13CM-SM REFRIGERATOR (NATIONAL) 10 ST (3) A13CM/NRA-13CM-TG REFRIGERATOR 20 ST (4) NR-A16CM/NRA 166M-SN REFRIGERATOR (NATIONAL) 30 ST (5) NR-A16CM/NRA16CM-TG REFRIGERATOR (NATIONAL) 26 ST.
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> Pada jam l/kurang 4.30 pagi 22.12.94 apabila saya sampai 202.5 L/Raya Selatan-Utara tiba-tiba terdengar bunyi dentuman kuat dibelakang m/lori (T) saya dan saya memberhentikan m/lori saya dan dapati m/lori (T) saya telah dilanggar oleh sebuah m/lori No: WBN 5064, pemandu m/lori tersebut tersepit dan saya bersama kelendan membantu keluarkan dan hantar ke Hospital.

> Saya dan kelendan saya tidak mengalami apa-apa kecederaan. Kerosakkan m/lori (T) saya dibahagian belakang remok, dan kerugian belum tahu. Inilah saya datang kebalai Trafik buat pengaduan.

In the circumstances, this court finds that the learned Sessions Court judge had not evaluated the evidence judiciously and seemed to have discarded the defendant's evidence. On the totality of the evidence he should have held that the defendant's evidence on the balance of probabilities was the truth and was more inherently probable and coupled with the fact that his evidence was not challenged.

Grounds Of Judgment Of The Learned Sessions Court Judge

In his grounds of judgment, the learned Sessions Court judge on one hand found that there were contradictions between the plaintiff's evidence in court and his police report which was made one day after the date of the accident. On the other hand, the learned Sessions Court judge seemed to have accepted the evidence of the plaintiff as the true version of how the accident occurred and relied on the case of *Chean Siong Guat v. Public Prosecutor* [1969] 2 MLJ 63 in order to justify or bolster up his decision in accepting the plaintiff's version and took into consideration the following passages in that case:

> At the hearing of this appeal the learned counsel for the appellant raised a number of grounds. He submitted that the learned magistrate erred in law as well as in fact in holding that the discrepancies in the evidence between PW1 and PW2 were trivial. In dealing with these discrepancies, the learned magistrate said: "To my mind these contradictions were minor differences and they do not affect the case in that the exhibits were found in possession of accused." He went on to cite a passage from *Sarkar on Evidence*, 10th edition at page 46 under the heading *"Disrepancies"* which states:
>
> > Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. But trifling discrepancies should be ignored as they are often a test of truth.
> >
> > The magistrate ignored these discrepancies. Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies.
> >
> > Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised

> by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say whether they are minor or serious discrepancies. If, after conthem. On the other hand, if a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth. In the present case, what the learned magistrate in fact found was that the discrepancies were minor and he quite properly ignored them.

This court wishes to make an observation that the passages in *Chean Siong Guat* which the learned Sessions Court judge had relied on with the view to disregard the said material contradictions of the plaintiff was in particular reference to the discrepancies between two different witnesses for the prosecution on the particular set of facts in that case which the trial court in that case found the discrepancies between PW1 and PW2 as trivial and minor differences that it did not affect the case. In the instant case, the learned Sessions Court judge went on to justify his decision by stating that since the plaintiff was not impeached, his evidence must be considered without proceeding to make a finding whether the discrepancies/contradictions has affected the credibility or truth of the plaintiff's evidence in court. In justifying to accept the plaintiff's evidence so as to decide in favour of the plaintiff as stated above, the learned Sessions Court judge said that the plaintiff's evidence was not impeached. This court is of the respectful view that this is a clear case of an attempt being made by the learned Sessions Court judge to bolster up his decision which is contrary to the weight of the evidence and to the probabilities which could not be supported on the totality of the evidence (see *R v. Low Toh Cheng* [1941] 10 MLJ (SSR) 1). Consequently, the judgment clearly suffers from defects and there was a clear misdirection on this aspect.

Issue Of Impeachment

It is the view of this court that merely because no application was made to impeach the credit of the plaintiff that does not necessarily mean that the trial court need not have to consider and make a finding on the glaring and material discrepancies and contradictions between the plaintiff's evidence in court and his police report which was marked as exh. P4. It cannot be denied that many parties do not wish to go through the lengthy and slow process of impeachment proceedings but merely to proceed to submit on the contradictions at the close of the case. In *Muthusamy v. Public Prosecutor* [1948] 14 MLJ 57 Taylor J said "this procedure is cumbersome and slow ...". On the other hand, this court is of the view that mere failure to have applied to impeach the credit of the

plaintiff does not change or erase the contradictions that are before the court and neither does it mean that the plaintiff's credibility based on the two different sets of version of how the accident occurred is not questionable or has been saved. This court is of the view that the learned Sessions Court judge should have made a specific finding as to what his views were on the contradictions between the plaintiff's evidence in court and his police report notwithstanding that there was no application to impeach the credit of the plaintiff.

Be that as it may, this court does not wish to dwell and repeat the law on the function of an appellate court on a finding of fact which was determined by a trial court as these principles are well established in our jurisdiction and other commonwealth jurisdictions. Some of the cases relied on are as follows:

1. *Coghlan v. Cumberland* [1898] 1 CH D 704
2. *Lofthouse v. Leicester Corporation (The Times Law Reports)* [1948] vol lxiv
3. *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326
4. *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 30 MLJ 87
5. *Hitam bin Abdullah & Anor v. Kok Foong Yee (F) & Anor* [1974] 1 MLJ 193
6. *Samar binte Mansor v. Mustafa Kamarul Ariffin* [1974] 2 MLJ 71
7. *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117
8. *Rasidin bin Partojo v. Frederick Kiai* [1976] 2 MLJ 214
9. *Siti Aisha binti Ibrahim v. Goh Cheng Hwai* [1982] CLJ 544; [1982] CLJ (Rep) 326
10. *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545
11. *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (Formerly Known As Maltran Air Services Corp Sdn Bhd) & Another Appeal* [1996] 3 CLJ 163
12. *Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh* [1997] 3 CLJ 225
13. *Mohd Samsuddin Ismail v. Tan Yeow Hwa & Anor* [2000] 4 CLJ 398

In *Sivalingam a/l Periasamay v. Periasamy & Anor* [1996] 4 CLJ 545, His Lordship Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal said:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. *But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.* (emphasis is by this court)

In *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (Formerly Known As Maltran Air Services Corp Sdn Bhd) And Another Appeal* [1996] 3 CLJ 163, His Lordship YAA Tan Sri' Dato' Seri Mohamed Dzaiddin bin Haji Abdullah FCJ (as His Lordship then was) presently the Rt. Hon. Chief Justice of Malaysia said that:

> ... a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former. That authority is the speech of *Lord Reid in the House of Lords'* decision in *Benmax v. Austin Motor Co Ltd [1955] 1 All ER 326, followed later by the Privy Council in the Singapore case of Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] MLJ 87 at p. 94. At p. 329, his Lordship* stated:
>
> > *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion. (emphasis added)
>
> In *Tay Kheng Hong v. Heap Moh Steamship Co Ltd*, the Singapore Court of Appeal found there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. It held that the trial judge was wrong in accepting the appellant's evidence. On appeal, the Privy Council held that the Court of Appeal's acceptance of the witness's evidence depended on inferences from documents. However, these inferences were insufficient material to entitle them to reject the result arrived at by the trial judge.

> In the present case, it is apparent to us that the learned judge based her findings after considering the evidence of the witnesses and the documents; and clearly, her conclusions were based on inferences drawn from them. In our view, the learned judge did not make any specific finding of fact based on the evidence of PW3 and DW3 and the documents. Although she accepted the evidence of PW3 and DW3 as the most telling, there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them. At any rate, we will also show that her acceptance of their evidence was wrong. As for the second issue, her conclusion depended entirely on inferences drawn from the three agreements, AB22, 26 and 29. Since the present case does not involve the question of credibility of the witnesses, we are satisfied, following the *Benmax* principle, that we are in as good a position to review and evaluate the evidence of the case as the trial judge.

In *Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh* [1997] 3 CLJ 225, His Lordship Gopal Sri Ram JCA *inter alia* said:

> Unless we, as a Court of Appeal, *are convinced that there was no judicial appreciation of evidence by the trier of fact, or that the audio-visual advantage reserved to a trial Judge had been missed or that the findings made do not accord with the probabilities of the case taken as a whole,* it will not be open to us to intervene and upset the findings made by a trial Judge. (emphasis by this court)

In His Lordship's dissenting judgment, the late HT Ong CJ Malaya said in *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175 at p. 177 said that an appellate court is in as good a position as the trial judge to draw its own conclusions from the primary undisputed facts. His Lordship went on to say that it is not correct to assume, as a matter of course and because the trial judge had seen and heard the witnesses, he must necessarily be right. His Lordship further said that even where the trial judge has been impressed by the demeanour of certain witnesses, the appellate court has still an obligation to scrutinise the evidence.

On the function of an appellate court, His Lordship the late Lord Denning MR in *Kerry v. Carter* [1969] 1 WLR 1372 at 1376 said as follows:

> We have been referred to cases on this subject, particularly the recent case of *Brown v. Thompson* [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely if ever, alter an apportionment made by the Judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Quintas v. National Smelting Board* [1961] 1 MLJ 401, 409. This court adopts in regard to apportionment the same attitude as it does to damages. *We will interfere if*

the judge has gone wrong in principle or is shown to have misapprehended the facts; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly. (emphasis by this court)

It is the view of this court that the learned Sessions Court judge in reaching his conclusion seemed not to have evaluated the whole of the evidence which was before him in a judicial manner and this has resulted in his findings being not satisfactory. In fact, this is a clear case where there was no proper judicial appreciation of evidence by the learned Sessions Court judge and the advantage which he had of seeing and hearing the witnesses was completely missed in that he had so fundamentally misdirected himself that this court cannot just fold its hands and say there is nothing this court can do because the findings of fact should not generally be disturbed. This court is of the view that it will be abrogating and shrinking its function if what has gone wrong so blatantly in the lower court is not put right.

It is the view of this court that merely finding that both parties are equally responsible for the accident as held by the learned Sessions Court judge and not supported by reasons on proper judicial appreciation or evaluation of the totality of evidence is not a judgment according to law (see *Tan Kim Leng & Anor v. Chong Boon Eng & Anor* [1974] 2 MLJ 151). This court is of the view that there must be reasoned judgment on the facts and in law and the Sessions Court judge should not shrink his duty by finding an easy way out for the sake of giving a decision and just apportioned the liability for the sake of apportionment but he must give reasons based on facts and the law as to how he had arrived at his decision.

There is also another unsatisfactory feature in this case which is totally against the settled principles and our adversarial system that is, in order to justify his erroneous finding both on law and fact, the learned Sessions Court judge had on his own volition and unilaterally invoked s. 114g of the Evidence Act 1950 against the defendant for not calling the attendant of his m/trailler to support his evidence in court and relied on *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 at 494. The learned Sessions Court judge has certainly erred in law when he had on his own volition and without giving an opportunity to both the parties invoked s. 114g of the Evidence Act 1950 against the defendant. The learned counsel for the plaintiff has admitted that no challenge was made to the defendant for failing to call the attendant as a witness and that this issue was also not raised by the plaintiff's counsel during his submissions in the lower court. In *Hadmor Productions Ltd v. Hamilton* [1983] 1 AC 191 at p. 233 Lord Diplock said:

> Under our adversary system or procedure, for a judge to disregard the rule which counsels are bound has the effect of depriving the parties to the act of benefit of one of the most fundamental rules of natural justice; the right to each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is.

This principle was followed in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 wherein His Lordship Gopal Sri Ram JCA said:

> ... in arriving at a decision upon any matter that presents itself for curial scrutiny, a judge must confine himself to the points raised by counsel before him. He may not decide a case upon a matter not raised by counsel unless he has first put the point fairly to both sides. It is not a matter of mere technicality. It is a rule of essential justice.

This court is of the view that the learned Sessions Court judge ought not to have taken the initiative to invoke s. 114g of the Evidence Act 1950 against the defendant on his own volition without having given an opportunity to both the parties to address the court whether adverse inference ought to be drawn against the defendant for failing to call the attendant to support his evidence in court. In any event, it is the view of this court that even on the facts of this case, adverse inference cannot be invoked against the defendant because firstly, the defendant was not challenged or asked whether he was calling the attendant as his witness, secondly, this issue was never raised by the plaintiff's counsel when the defendant was cross-examined and thirdly, it was never even raised in the submissions of the plaintiff's counsel and yet the learned Sessions Court judge seemed and deemed fit to have taken over the duty of the plaintiff's counsel when he unilaterally invoked the provision of s. 114g of the Evidence Act 1950 against the defendant which no doubt is against judicial trend. In *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196, His Lordship Sharma J (as His Lordship then was) said:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

It was not open to the learned magistrate to fly off at a target as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton LJ in the case of *Blay v. Pollard & Morris*:

> Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v. Sakiman* where Sir Charles Mathew CJ said:

> I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the Constitution and the Government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.

On the issue of r. 22 of the Highway Code L.N. 165/1959 Road Traffic Rules 1959, this court invited both counsels to address the court whether r. 22 of the Highway Code L.N. 165/1959 Road Traffic Rules 1959 would apply against the plaintiff as the collision was from the rear. The learned counsel for the plaintiff submitted that r. 22 of the Highway Code would apply against the plaintiff on the facts of this case and this was confirmed by the learned counsel for the defendant. In fact, any breach of the provisions of the Highway Code which is directly relevant to the facts of the case is *prima facie* evidence of negligence under s. 63(1) of the Road Transport Act 1987. In this case, since there was a breach of r. 22 of the Highway Code L.N. 165/1959 Road Traffic Rules 1959 on the part of the plaintiff, there is *prima facie* evidence of negligence against the plaintiff (see *Chan Peng Fook v. Kan Pak Lee* [1974] 2 MLJ 197 and *Yahaya bin Mat & Anor v. Abdul Rahman bin Abu* [1982]

CLJ 68. In *Lim Choon Ghee v. Sharizan bin Md Isa* [1998] 2 CLJ 904 at p. 908, His Lordship Mahadev Shankar JCA in delivering the judgment of the Court of Appeal said:

> We are satisfied that this was a case where the plaintiff was driving too fast and also following too close to the van in front of him with which he collided when that van moved towards the centre of the road in order to turn right into Jalan Taman Selamat. The issue here was a pure question of fact and the presumption is that the plaintiff had only himself to blame. This presumption was borne out completely by the police report and the sketch plan. (emphasis is by this court)

(see also *Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1977] 2 MLJ 85).

May this court take this opportunity to state that it will be a sad day for litigants if Magistrates or Sessions Court judges were to descend into the arena of litigants and take over the role of counsels representing parties in litigation matters either with a view to destroy or weaken a party's case or with a view to strengthen or improve a party's case. This kind of conduct will only invite unnecessary accusations or favouring one party or the other and this could result in litigants losing confidence in our judicial system. In *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 2 MLJ 165 at 168 Lord Roskill for the Privy Council said:

> Their Lordships do not find it surprising that the Court of Appeal not only felt obliged to reach the conclusion which they expressed orally at the conclusion of the hearing of the appeal that the learned judge's findings on the issue favourable to the appellant could not be supported, and that that court must reverse the learned judge's judgment and enter judgment for the respondents, but that in their written judgment they should have said that in basing his finding "entirely on the credibility or otherwise of the witnesses testifying before him" the learned judge was guilty of "a plain misdirection." Their Lordships respectfully agree with the Court of Appeal that the findings favourable to the appellant were arrived at "without an adequate scrutiny and consideration of all the evidence before him."
>
> Their Lordships are well aware, as no doubt were the Court of Appeal, of the limited circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial. *But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise that error result in serious injustice.* (emphasis is by this court)

It is settled law that the onus is on the plaintiff to prove affirmatively that the accident occurred due to the negligence of the defendant and it is not for the defendant to excuse himself that he was not negligent. In *Ng Chui Sia v. Maimon bt Ali* [1983] 1 MLJ 110, His Lordship Hashim Yeop A. Sani J said:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. *The plaintiff must show affirmatively that there has been a breach of a specific or general duty by the defendant and this resulted in the damage to the plaintiff. If he fails to prove this the action must fail.* (the emphasis is by this court)

In *Lim Kim Chet & Anor v. Multar bin Masngud* [1984] 2 MLJ 165, Lord Keith of Kinkell (delivering the oral judgment of the Privy Council) said:

> The first and second appellants now appeal to this Board. In their Lordships' opinion the reasons for his judgment given by the learned trial judge were unsatisfactory and in some respects contradictory of each other. It seems to their Lordships that this is very clearly a case where, consistently with the principles laid down by Lord Thankerton in *Thomas v. Thomas*, the Federal Court were entitled to review the findings of fact of the trial judge and to reach their own conclusion upon the evidence.
>
> Further, their Lordships are in complete agreement with the Federal Court that upon a proper consideration of the evidence as recorded by the trial judge the correct conclusion is that the accident was caused by the negligence of the lorry driver and that the appellants are liable in damages. The damages are not now disputed, the defendants being content to accept the assessment made by the Federal Court.

In *Taharuddin bin Ahmad v. Leo Moi & Anor* [1989] 2 CLJ 1271 at 1272 His Lordship Hj. Lamin bin Hj. Mohd Yunus J (as he then was) said:

> Upon close scrutiny of the plaintiff's testimony I found material contradictions between his evidence in Court and his police report. In his police report which was made four days after the accident he stated that "satu lorry dari Jalan Gambang masuk ke Jalan Pekan dan saya terbabas dan sebuah kereta Mercedez didepan saya terus langgar saya." During cross-examination he was asked as to what he meant by "terbabas". His answer was that when he applied the brakes his motorcycle still continued moving. However when it was directly put to him the meaning of "terbabas" in that he skidded and lost control he did not agree. In Malay "terbabas" connotes a change of direction as a result of loss of control.

This court finds that the plaintiff's evidence in court was a complete deviation as to how the accident occurred when compared to his police report exh. P4 and that his evidence in court is highly suspect and requires satisfactory explanation for this material contradictions before the court could have

accepted his evidence in his favour. There is no doubt that his evidence in court was an afterthought attempt and to exculpate himself from being responsible for the accident. On this ground alone, the learned Sessions Court judge should have dismissed the plaintiff's claim instead of attempting to justify to find for the plaintiff by stating that "since his evidence was not impeached," the court ought to believe that the plaintiff's evidence was probable without making any finding whether the material contradictions in the plaintiff's evidence has affected the credibility of the plaintiff. Consequently, the learned Sessions Court judge should have held that on the balance of probabilities the plaintiff had failed to prove his case against the defendant. The learned Sessions Court judge did not say that the plaintiff's version is more inherently probable but instead he just said that the court was satisfied that the plaintiff's version was probable when in fact his findings was against the weight of the evidence and yet he proceeded to find both parties equally responsible for the accident and accordingly, apportioned liability on a 50:50 basis without any proper legal basis. In *Chong Keow @ Chong Seaw Oon (Suing As The Administrator Of The Estate Of Wong Kooi Tai @ Wong Foo Keak – Deceased) v. Shaari bin Yaacob* [1988] 1 CLJ 325 at 327, His Lordship Lim Beng Choon J said:

> The existence of two conflicting versions of how an accident occurred (as it happens here) is typical in almost all motor vehicle accident cases. In such a situation, I will have to carry out a searching evaluation and assessment of the totality of the oral evidence and also to resort to the documentary evidence in order to find out the truth. In my attempt to uncover the truth in order to arrive at a just decision, I must not lose sight of the principle that in assessing the evidence of the parties in a suit, it is not merely a question of whom to believe **but rather whose version is more inherently probable which is the prime consideration.** (emphasis is by this court)

In *Coghlan v. Cumberland* [1898] 1 Ch D 704, the Court of Appeal said:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit.
>
> The court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the court is sensible of the great advantage he had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns

> on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. *But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.* (emphasis is by this court)

In *Lofthouse v. Leicester Corporation* The Times Law Reports 1948 vol lxiv, Lord CJ Goddard said:

> I have known cases where this Court has interfered because it has thought that the Judge who tried the case has decided how the accident happened not on the evidence given, but on how he thought that the accident probably happened.

In *Samar binte Mansor v. Mustafa Kamarul Ariffin* [1974] 2 MLJ 71, by a majority judgment, the Federal Court chaired by His Lordship Suffian LP said:

> The learned trial Judge was concerned to determine who was telling the truth, **but we sitting in an appellate court are concerned to determine not so much the truth as whether there had been error on the part of the trial Judge.** (emphasis is by this court)

In the circumstances, this court finds that there are several errors and misdirections as mentioned above on the part of the learned Sessions Court judge that his findings cannot be sustained and is unsatisfactory and in some respect contradictory to each other. Had the learned Sessions Court judge directed his mind to the correct approach and evaluated the evidence in its totality and judiciously bearing in mind the entirely new version of the plaintiff's evidence in court about six years later when compared to his police report which was made the next day after the accident as to how the accident occurred and taking into consideration the plaintiff's own pleadings and statement of agreed facts, the learned Sessions Court judge would no doubt have found for the defendant that on the balance of probabilities the defendant's version was more inherently probable. Consequently, he ought to have dismissed the plaintiff's claim.

Accordingly, the decision of the learned Sessions Court judge cannot be sustained in law and on the facts as it is clearly against the weight of the evidence and ought to be reversed. The defendant's appeal is allowed, the apportionment of liability on a 50:50 basis by the learned Sessions Court judge is set aside and the plaintiff's claim is dismissed with costs.